

**DEPARTMENT OF TRANSPORTATION****Federal Transit Administration****49 CFR Parts 653 and 654**

[Docket No. 92-H or I]

RIN 2132-AA37; 2132-AA38

**Prevention of Prohibited Drug Use in Transit Operations; Prevention of Alcohol Misuse in Transit Operations****AGENCY:** Federal Transit Administration, DOT.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Transit Administration (FTA) is proposing to amend its drug and alcohol testing rules to exempt volunteers and eliminate the citation requirement in the non-fatal, post-accident testing provision applicable to non-rail vehicles. We also seek comment on whether an "accident" should be defined to include the discharge of a firearm by a transit security officer. This rule, if adopted, is intended to increase the safety of mass transit and clarify certain provisions in the existing rules.

**DATES:** Comments on these proposed amendments must be submitted by April 7, 1995.

**ADDRESSES:** Comments should be sent to: Docket Clerk, Docket No. 92-H or I, Federal Transit Administration, Department of Transportation, 400 Seventh Street SW., Room 9316, Washington DC 20590. Comments will be available for inspection at this address Monday through Friday from 9 a.m. to 5 p.m. If you would like acknowledgment of receipt of your comment, please include a stamped, self-addressed postcard with your comment.

**FOR FURTHER INFORMATION CONTACT:** For program issues, Judy Meade or Rhonda Crawley of the Office of Safety and Security, Federal Transit Administration, (202) 366-2896. For legal questions, Nancy M. Zaczek or Daniel Duff, Office of the Chief Counsel, Federal Transit Administration, (202) 366-4011.

**SUPPLEMENTARY INFORMATION:** The FTA proposes to make the following changes to its drug and alcohol testing rules.

**I. Volunteers**

Under the final drug and alcohol rules, published in the *Federal Register* on February 15, 1994, at 59 FR 7531-7611, a volunteer who performs a safety-sensitive function generally is subject to testing for prohibited drugs and the misuse of alcohol. Since issuance of the final rules, however, a number of

entities have urged the agency to exempt volunteers from application of the rules, contending that many volunteer drivers and dispatchers would be unwilling to continue to provide free services if they are subject to drug and alcohol testing. Indeed, volunteers may have a heightened concern about privacy and related issues that arise in connection with drug and alcohol testing since they are not paid for their services and often are not entitled to the benefits paid employees receive. Moreover, organizations that use volunteer drivers are concerned about the practicality and cost of covering volunteers under the rules.

To help frame this issue, we provide the following general information about the role of volunteers in mass transportation activities. Volunteers are used by a number of entities, particularly recipients of FTA formula funding for nonurbanized areas (formerly the section 18 program), which means that most such entities are not required to implement the drug and alcohol testing program until January 1, 1996, the implementation date for small operators. According to letters we have received, a typical volunteer is a community-minded senior citizen. Many volunteers act as drivers, but at least one agency uses volunteers to dispatch vehicles from their homes. The volunteers generally donate their time and often their own vehicles. In return, they often are reimbursed for mileage costs; some also are reimbursed for maintenance costs.

Entities that use volunteers often principally serve the elderly and persons with disabilities; one agency notes that it does not serve anyone under the age of 60. Several FTA recipients or subrecipients lease vehicles to the American Red Cross, which often uses volunteer drivers. Most serve sparsely populated areas; one agency indicates that it serves five rural communities with a combined population of 6,000 persons.

The number of volunteers used by the agencies varies greatly; for example, one agency uses 30 volunteers, another 450. One agency reported that it provided 16,000 trips using volunteer drivers, another 11,700 trips. One organization indicated that 70 percent of the trips it provided were for medical purposes.

Accordingly, FTA seeks comment on whether volunteers should be excluded from coverage under the rules. Does the potential loss of volunteer services from application of the rules outweigh any safety issues? Are those who volunteer their services unlikely or less likely to take prohibited drugs or operate a vehicle while alcohol impaired? Do the

affected organizations evaluate their volunteers' performance? We note, moreover, that FTA is the only DOT drug and alcohol program specifically to require testing of volunteers, although the Federal Highway Administration's testing of those required to hold a Commercial Driver's License (CDL) would apply to any volunteers in that category.

**II. Post-Accident Testing**

The FTA proposes to change sections 653.45(a)(2)(i) and 654.33(a)(2)(i), which require a post-accident drug and alcohol test after a non-fatal accident when the mass transit vehicle involved is a bus, van, electric bus, or automobile. Those sections currently require a post-accident test if, among other things, the operator of the mass transit vehicle involved in the accident receives a citation from a State or local law enforcement official.

We have been advised that an operator of a mass transit vehicle rarely receives a citation from the police, or, if one is issued, often it is several days or weeks after the accident. Because a post-accident test must be conducted as soon as practicable following an accident, but no later than 32 hours after the accident for drug testing and 8 hours for alcohol testing, the citation requirement under the existing regulations effectively precludes a transit operator from conducting a post-accident drug and alcohol test in connection with accidents of this type. We therefore propose to change this portion of the post-accident testing provision by deleting the citation requirement and inserting in its place the phrase "unless the employer determines, using the best information at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident."

Under the proposed revision, a post-accident test would be required of an operator of a mass transit vehicle after a non-fatal accident involving a bus, van, electric bus, or automobile when an individual has been injured as a result of an occurrence associated with the operation of the vehicle and immediately receives medical attention away from the scene, or any vehicle suffers "disabling damage." Once these conditions are met the operator of the vehicle must be given a post-accident test unless the employer has determined that the employee's actions could not have contributed to the accident.

We seek comment on this proposed amendment and note that it affects only the operator of the mass transit vehicle.

### III. Definition of Accident—Armed Security Personnel

In the rules, an accident is limited to events involving the operation of a mass transit vehicle. Some commenters, however, note that the definition of accident does not include the discharge of a firearm by armed security personnel, who are considered safety-sensitive workers subject to the drug and alcohol testing program.

While we are aware of the danger that drug or alcohol impaired security personnel could pose to the traveling public, in developing the rules we assumed that, in the event of a discharge of a weapon, affected security personnel would be subject to an appropriate internal review of the circumstances that triggered the discharge. In this connection, FTA has stated that its drug and alcohol testing rules do not cover police officers who provide some services to a transit property, but are not supervised by the transit system, recognizing that in most municipalities police officers who discharge firearms are subject to their own internal comprehensive review procedures regarding any such incident.

We now seek comment on this issue in general but do not propose a revision of the rule in this Notice of Proposed Rulemaking. Should we amend the definition of "accident" to include the discharge of a firearm by a covered employee while on duty? Should all discharges be covered or just those deemed "accidental," or only those incidents resulting in injury or death? Or is this matter one that should be left to the transit system to address under its own procedures? In this regard, we seek comment on the existing safety procedures applicable to armed security transit personnel in the event of a discharge of a weapon.

### IV. Regulatory Process Matters

#### A. Executive Order 12688

The FTA evaluated the industry costs and benefits of the drug and alcohol testing rules when it issued 49 CFR parts 653 and 654 on February 15, 1994, at 59 FR 7531-7611. It is not anticipated that the proposed change to the post-accident testing provision would alter the costs and benefits of either part 653 or 654. On the other hand, the exclusion of volunteers from coverage under the rules would slightly lower the overall cost of the program.

#### B. Departmental Significance

Neither rule is a "significant regulation" as defined by the Department's Regulatory Policies and Procedures, because it proposes only minor changes to parts 653 and 654.

#### C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the FTA evaluated the effects of parts 653 and 654 on small entities when they were issued in February 1994. These proposed changes will not change that analysis.

#### D. Paperwork Reduction Act

This rule does not include information collection requirements subject to the Paperwork Reduction Act.

#### E. Executive Order 12612

We reviewed parts 653 and 654 under the requirements of Executive Order 12612 on Federalism. These proposed rules, if adopted, will not change those assessments.

#### F. National Environmental Policy Act

The agency determined that these regulations had no environmental implications when it issued parts 653 and 654, and there will be none under the proposed rules, if adopted.

#### G. Energy Impact Implications

These proposed regulations do not affect the use of energy.

#### List of Subjects in 49 CFR Parts 653 and 654

Alcohol testing, Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety and Transportation.

For the reasons set forth in the preamble, the FTA proposes to amend Title 49, Code of Federal Regulations, parts 653 and 654 as follows:

#### PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

1. The authority citation for part 653 continues to read as follows:

**Authority:** 49 U.S.C. 5331; 49 CFR 1.51.

2. The definition of "covered employee" in section 653.7 is revised to read as follows:

##### § 653.7 Definitions.

\* \* \* \* \*

*Covered employee* means a person, including an applicant, or transferee,

who performs a safety-sensitive function for an entity subject to this part, or a volunteer who is required by Federal law or regulation to hold a Commercial Driver's License when performing a safety-sensitive function for the employer.

\* \* \* \* \*

##### § 653.45 [Amended]

3. The first sentence of section 653.45(a)(2)(i) is amended by removing "if that employee has received a citation under State or local law for a moving traffic violation arising from the accident" and adding "unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident".

#### PART 654—PREVENTION OF ALCOHOL MISUSE IN TRANSIT OPERATIONS

4. The authority citation for part 654 continues to read as follows:

**Authority:** 49 U.S.C. 5331; 49 CFR 1.51.

5. The definition of "covered employee" in section 654.7 is revised to read as follows:

##### § 654.7 Definitions.

\* \* \* \* \*

*Covered employee* means a person, including an applicant, or transferee, who performs a safety-sensitive function for an entity subject to this part, or a volunteer who is required to hold a Commercial Driver's License under Federal law or regulation when performing a safety-sensitive function for the employer.

\* \* \* \* \*

##### § 654.33 [Amended]

6. The first sentence of section 654.33(a)(2)(i) is amended by removing "if that employee has received a citation under State or local law for a moving traffic violation arising from the accident" and adding "unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident".

Issued on: January 31, 1995.

**Gordon J. Linton,**  
*Administrator.*

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